

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-6147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
SCHEDULE NO. 1350,

Defendants in Rem,

FRED CHERRY,

Claimant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

FRED CHERRY
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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
THE ISSUES	1
STATEMENT OF THE PROCEEDINGS	1
STATEMENT OF THE FACTS	2
POINT I - Appellant should have been granted an opportunity to prove intentional and purposeful discrimination	3
POINT II - Appellant should have been granted an opportunity to present evidence of the local community standard of obscenity	7
POINT III - Non-obscene material included in a package with material found to be obscene is not subject to forfeiture under 19 U.S.C. 1305	8
POINT IV - This court should determine for itself whether or not the material found to be obscene by the court below is, in fact, obscene	9
CONCLUSION	9
TEXT OF 19 U.S.C. 1305	10

CASES CITED

<u>Freedman v. Maryland</u> , 380 U.S. 51	8
<u>Hamling v. United States</u> , 418 U.S. 87	7
<u>Neaderland v. C.I.R.</u> , 424 F.2d 639	6
<u>United States v. Berrios</u> , 501 F.2d 1207	4
<u>United States v. Various Articles of Obscene Merchandise</u> , <u>Schedule No. 1303</u> , _ F. Supp. _ (S.D.N.Y., 1976) (Appeal Pending, Second Circuit, Docket No. 76-6152)	4, 5, 8

<u>United States v. 18 Packages of Magazines</u> , 227 F. Supp. 198	8
<u>United States v. 35 MM. Motion Picture Film, Etc.</u> , 432	
F.2d 705	9
<u>Zdanok v. Glidden Company, Durkee Famous Foods Division</u> ,	
327 F.2d 944	8

STATUTE CITED

19 U.S.C. 1305	1, 2, 4, 5, 8
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PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Irving Ben Cooper of the United States District Court for the Southern District of New York. The decision was not reported.

THE ISSUES

The issues presented by this appeal are:

1. Whether appellant should have been granted an opportunity to prove intentional and purposeful discrimination.
2. Whether appellant should have been granted an opportunity to present evidence of the local community standard of obscenity.
3. Whether non-obscene material included in a package with material found to be obscene is subject to forfeiture under 19 U.S.C. 1305.
4. Whether the material found to be obscene by the court below is, in fact, obscene.

STATEMENT OF THE PROCEEDINGS

Fred Cherry, claimant-appellant, pro se, appeals from the final judgment in favor of the plaintiff, United States of America, entered on July 13, 1976.

This action was brought by plaintiff, United States of America (hereinafter, "the U.S.") for the forfeiture and destruction, pursuant to 19 U.S.C. 1305, of a mail article consisting of an envelope, a magazine, order blanks, and

advertising material, mailed from Europe to the home of the claimant-appellant, pro se (hereinafter, "the importer"), in Puerto Rico.

A trial for forfeiture was scheduled for 4/12/76, at a time when the importer was residing in Puerto Rico. The importer informed the court that he would be travelling to New York at the beginning of June and requested that the trial be postponed until sometime in July. The court granted the importer's request in part, by postponing the trial until June 10, 1976. On June 2, 1976, the importer returned to New York and inspected the seized material on June 3. After inspecting said material, the importer requested a further postponement for the purpose of conducting discovery proceedings. The importer's request for an opportunity to conduct discovery proceedings was denied, a trial was held, and the seized articles were found to be obscene by the jury. After the conclusion of the trial, the court ruled that the order blanks, included in the same package with the material found to be obscene, are also subject to forfeiture.

STATEMENT OF THE FACTS

This appeal is an appeal from a forfeiture, pursuant to 19 U.S.C. 1305 (see final judgment, App, 62a-63a). The importer was attempting to import a single copy of a magazine by mail order for his own use. The cost of the magazine was eight dollars (trial transcript, App, 30a). The magazine was addressed to the importer's residence in Puerto Rico (trial transcript, App, 24a). The importer informed the court that he would be unable to attend the trial, as originally scheduled, and requested a

postponement until July (letter to court, App, 4a). A postponement was granted, but until June 10, and not until July, as requested (order, App, 5a). The importer first examined the seized articles in question on June 3, and then requested a further postponement in order to conduct discovery proceedings (letter to court, App, 6a, 6b). The importer was attempting to obtain evidence of purposeful and intentional discrimination (letter to court, App, 6a, 6b). The U.S. objected to the proposed discovery (letter to court, App, 6c, 6d), and the court sustained the objections (transcript of proceedings on 6/10/76, App, 7a, 7b). Then the trial was held. During the trial, the importer was denied all opportunity to present evidence of the community standard of obscenity (trial transcript, App, 30a-33a, in particular 31a, line 21 to 32a, line 7). The jury found the magazine contained in the seized package to be obscene. At the conclusion of the trial the court ruled that the order blanks, mailed in the same envelope with the magazine, were also forfeited (trial transcript, App, 61a).

POINT I

APPELLANT SHOULD HAVE BEEN GRANTED AN OPPORTUNITY TO PROVE INTENTIONAL AND PURPOSEFUL DISCRIMINATION

The importer contends that the Customs Bureau maintains a double standard in the enforcement of importation censorship. That is, the importer contends that commercial importers, represented by lawyers, are permitted to import material which is more "obscene" than the material which non-commercial

importers, unrepresented by lawyers, are permitted to import. If the importer could prove that this alleged discrimination exists it would constitute "intentional and purposeful discrimination", and hence be a violation of the due process clause of the Fifth Amendment. United States v. Berrios, 501 F.2d 1207 (2nd Cir., 1974). In Berrios, this court set forth the principles to be applied in evaluating a claim of "intentional and purposeful discrimination". As pointed out in Berrios, a litigant should be permitted to present evidence of "intentional and purposeful discrimination".

When the complaint in this action was filed, the importer was residing in Puerto Rico and could not return to New York until one week before the rescheduled trial date (letters to the court, App, 4a, 6a, 6b). At that time the importer was first (i.e., not before then) permitted to examine the seized material in order to prepare for trial (letter to court, App, 6a, 6b). Now, of course, it was not the importer's fault that he was not permitted to examine the material in question before that occasion. If the statute (19 U.S.C. 1305) permitted a change of venue, the importer would have requested a change of venue, and would have examined the material in question in Puerto Rico. As a matter of fact, there is another case on appeal in this court at present, in which the question of permitting a change of venue when material is seized pursuant to 19 U.S.C. 1305, is presented. The title of that case is United States of America v. Various Articles of Obscene Merchandise, Schedule No. 1303. The docket number of that case in this court is 76-6152. However, at the time that the present case was being litigated in the court

below, it was considered to be the law that no change of venue was permitted in a case brought under 19 U.S.C. 1305. See pages 13-14 of the opinion in United States of America v. Various Articles of Obscene Merchandise, Schedule No. 1303, now on appeal before this court (Docket No. 76-6152). On page 14 of that opinion, the court below states that "The claimant was not given this choice." (i.e., the option to request a change of venue). In addition, claimants are permitted to examine seized merchandise only in the district of seizure. 19 U.S.C. 1305 clearly provides this in that it states: "Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court, as hereinafter provided." (emphasis supplied)

Now, immediately after the importer had examined the seized merchandise in question he came to the conclusion that, insofar as this particular merchandise is concerned, the Customs Bureau is enforcing 19 U.S.C. 1305 with "intentional and purposeful discrimination". It was, of course, impossible to come to this conclusion before examining the material in question. Next, the importer requested postponement of the trial in order to conduct discovery proceedings for the purpose of obtaining evidence of "intentional and purposeful discrimination" (letter to court, App, 6a, 6b). The U.S. objected to the proposed discovery proceedings (letter to court, App, 6c, 6d), and the court "denies in all respects Mr. Cherry's application for an opportunity to conduct discovery proceedings" embodied in his letter of June 5, 1976 [App, 6a, 6b], for the reasons set forth

in the Government letter of June 8, 1976 [App, 6c, 6d]."
(transcript of proceedings on 6/10/76, App, 7a, 7b).

The U.S. Attorney, in his letter (App, 6c, 6d), offered two reasons for denying the importer's request for an opportunity to conduct discovery proceedings. The U.S. Attorney's first claim was that the Customs Bureau had not "approved" the importation of a certain commercial motion-picture film which the importer claims is more "obscene" than the magazine in question herein. The point is not whether the Customs Bureau "approved" the film, but whether or not any official in the Customs Bureau viewed the film, and failed to take action to seize it.

The other reason which the U.S. Attorney gave for denying the importer an opportunity to conduct discovery proceedings, was that the importer previously raised the same issue in a different case. It is true that the importer raised the issue of discrimination previously, but in that previous case it was held that the importer had merely alleged, without proving, discrimination. In the present case, we have an entirely different situation. As this court has held, in Neaderland v. C.I.R., 424 F.2d 639, 642 (1970) "Collateral estoppel is confined however, to 'situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.'" (emphasis supplied). Anyway, note that there is nothing in the record to show exactly what was decided in that previous case, mentioned in the U.S. Attorney's letter.

To sum up this point, the importer raised a claim of "purposeful and intentional discrimination", and was denied all

opportunity to prove same.

POINT II

APPELLANT SHOULD HAVE BEEN GRANTED AN OPPORTUNITY TO
PRESENT EVIDENCE OF THE LOCAL COMMUNITY STANDARD OF
OBSCENITY

In order for an item to be found obscene, it must be found to exceed the local community standard of obscenity. Therefore, an importer must be given some opportunity to present evidence on this standard. The court below seems to be of the opinion that what is generally available in the community has no bearing whatsoever on the issue of obscenity. See pages 24-25 of the trial transcript (App, 31a-32a), where the court says: "What you saw in a movie and what you purchased in a magazine anywhere has nothing to do with the issue presented here, and that is whether the Government exhibit which was introduced into evidence, Government Exhibit 2, is obscene -- that particular magazine; not what others may do, even though it is just as bad or worse or not as bad or whatever angle you want to approach it by. That would not really enter into this case."

This totally misconstrues the case law. Even in Hamling v. United States, 418 U.S. 87, 125, the litigant was allowed to present some evidence on the question of what is generally available in the community, by means of expert testimony.

This procedure for a litigant to hire an expert witness to testify on the nature of the material generally available in the community, is fine when the litigant is a commercial dealer and

thousands of dollars are at stake. But when, as here, an item costing eight dollars (trial transcript, App, 30a) is at stake, to tell a litigant he can present evidence only by means of expert witnesses, would be so burdensome as to violate the First Amendment. Cf. Freedman v. Maryland, 380 U.S. 51. For another opinion on how an unreasonable burden in an obscenity case violates the First Amendment, see pages 12-14 of the opinion in United States of America v. Various Articles of Obscene Merchandise, Schedule No. 1303. That case is presently on appeal before this court (Docket No. 76-6152).

POINT III

NON-OBSCENE MATERIAL INCLUDED IN A PACKAGE WITH MATERIAL FOUND TO BE OBSCENE IS NOT SUBJECT TO FORFEITURE UNDER 19 U.S.C. 1305

In United States v. 18 Packages of Magazines, 227 F. Supp. 198, a district court in California clearly decided that non-obscene material included in a package with obscene material, is not subject to forfeiture under 19 U.S.C. 1305. This is the only reported decision in which this point was squarely decided. In addition, since the U.S. was the losing litigant in that case and since the U.S. had the opportunity to appeal, but did not do so, the U.S. is bound by the doctrine of collateral estoppel from raising this same issue again. In Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 954-956, (1964), this court held that mutuality is not required in order to invoke the doctrine of collateral estoppel.

The importer raised the claim herein at the trial (trial transcript, App, 14a-16a), and said claim was decided against the importer at the conclusion of the trial (trial transcript, App, 61a).

POINT IV

THIS COURT SHOULD DETERMINE FOR ITSELF WHETHER
OR NOT THE MATERIAL FOUND TO BE OBSCENE BY THE
COURT BELOW IS, IN FACT, OBSCENE

In United States v. 35 MM. Motion Picture Film, Etc., 432 F.2d 705, 709-711 (1970), this court held that it is the duty of the reviewing court to make an independent judgment on the question of obscenity, irregardless of the fact that the case was decided below by a jury.

CONCLUSION

The judgment below should be reversed in part, insofar as the order blanks are concerned (point III), and remanded to the court below for further proceedings in order to afford the importer an opportunity to prove "intentional and purposeful discrimination" (point I), and in order to afford the importer an opportunity to present evidence on the community standard (point II). Or, in the alternative, this court may reverse on a finding of non-obscenity (point IV).

Respectfully submitted

Fred Cherry

FRED CHERRY

Claimant-Appellant, pro se

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
REGION II
NEW YORK, N.Y. 10048

SEC. 305 IMMORAL ARTICLES—IMPORTATION PROHIBITED

All persons are prohibited from importing into the United States from any foreign country: any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: **Provided**, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: **Provided further**, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

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Robert B. Fiske, Jr.
UNITED STATES ATTORNEY

11/29/76

Marian J. Bryant